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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

FRED R. SACHER, Plaintiff and Respondent, v. KENNETH A. SACHER, Defendant and Appellant.	G055822 (Super. Ct. No. 30-2016-00884839)
FRED R. SACHER, Plaintiff and Respondent, v. KENNETH A. SACHER et al., Defendants and Appellants.	G055838 (Super. Ct. No. 30-2017-00901707)
RUTH F. SACHER, Plaintiff and Appellant, v. FRED R. SACHER et al., Defendants and Respondents.	G055850 (Super. Ct. No. 30-2017-00916189) O P I N I O N

Appeal from orders in three related cases of the Superior Court of Orange County, Aaron W. Heisler, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed. Motion to augment the record granted.

Lewis Brisbois Bisgaard & Smith, Raul L. Martinez, Joseph K. Hegedus, and Lance A. Selfridge for Defendants and Appellants Kenneth A. Sacher, Lynne Sacher, and Sharon K. Andrews, and for Plaintiff and Appellant Ruth F. Sacher.

Bohm Wildish & Matsen, James G. Bohm, Gil Partida, Gordon C. Stuart; Ulwelling Law, James K. Ulwelling, and Lauren E. Saint for Plaintiff, Defendant and Respondent Fred R. Sacher.

No appearance for Defendant and Respondent Christine M. Heston.

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Kenneth A. Sacher (individually and on behalf of Ruth Sacher), Lynne Sacher and Sharon K. Andrews appeal from orders disqualifying their counsel, Lewis Brisbois Bisgaard & Smith and Joseph K. Hegedus, from representing them in three related civil actions, which appeals were consolidated for all purposes. All three actions—which are part of a wider family trust dispute—include allegations that Fred Sacher's counsel, James G. Bohm of Bohm Wildish & Matsen, LLP, has exercised undue influence over him and otherwise acted in an unethical manner.

Fred,[1] along with Bohm and Bohm Wildish, moved to disqualify Lewis Brisbois in all three cases on the ground that Lewis Brisbois represented Bohm and Bohm Wildish in an unrelated matter, and thus its concurrent representation of parties whose interests conflict with Bohm and Bohm Wildish is a disqualifying breach of Lewis Brisbois' duty of loyalty. The trial court agreed, citing this court's opinion in *Hernandez*

[1] Because all the Sacher parties share the same last name, we refer to them by their first names for the sake of clarity. No disrespect is intended.

v. Paicius (2003) 109 Cal.App.4th 452 (disapproved of on another ground in *People v. Freeman* (2010) 47 Cal.4th 993, 1006, fn. 4) (*Hernandez*).

Lewis Brisbois contends the trial court erred by: (1) concluding Fred had standing to complain of Lewis Brisbois' conflict; (2) failing to recognize that it represented only the firm of Bohm Wildish, and not Bohm individually, in the other case; (3) relying on *Hernandez* which applies only to lay clients and would not require disqualification until Lewis Brisbois actually calls Bohm to testify about his alleged misconduct; and (4) failing to demonstrate, in its orders, that it balanced the appropriate factors to support disqualification. None of these contentions is persuasive and we affirm the orders.[2]

Because the disqualification motions were brought jointly by Fred and his counsel, Lewis Brisbois' assertion that Fred lacked standing is effectively a concession that Bohm and Bohm Wildish did have standing. In any event, the primary interest being vindicated when an attorney is disqualified from litigation is the court's own interest in ensuring that legal proceedings conducted before it appear to be and are, in fact, fair. Hence, the court is authorized to issue such a ruling without regard to the interests of the individual parties.

The assertion that Lewis Brisbois breaches no duty to Bohm Wildish—the law firm—by making allegations against Bohm as an individual ignores the fact that Bohm Wildish acts through the attorneys it employs. Consequently, an allegation of professional misconduct against Bohm is also an allegation against Bohm Wildish.

Lewis Brisbois' attempt to distinguish *Hernandez* fails because it ignores the fact *Hernandez* relies on *Flatt v. Superior Court* (1994) 9 Cal.4th 275, a Supreme

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[2] Fred has moved to augment the record to include (1) Kenneth's objection to Fred's Petition to Confirm Fred Sacher as Sole Trustee of the Sacher Family Trust, filed on or about April 20, 2017, and (2) the reporter's transcript of the October 18, 2017 hearing on Fred's motion to disqualify Lewis Brisbois. That motion is granted.

Court case which is not distinguishable on either point raised. Finally, the balancing of factors that Lewis Brisbois calls for has no application to a mandatory disqualification case. Thus, to the extent the court's extensive analysis might be found lacking on that single point (and we reach no such conclusion), we find no error.

FACTS

In November 2016, Fred—represented by Bohm, Bohm Wildish and Brandson S. Miller, another attorney employed by Bohm Wildish—filed a petition to confirm his status as the sole trustee of the Amended and Restated Sacher Family Trust, dated August 2, 1982 (the Trust). The petition alleged that Fred's wife and co-trustee, Ruth, lacked capacity to continue serving due to her dementia.

Kenneth opposed the petition, asserting among other things that he was Ruth's successor as co-trustee of the Trust, and that he and Fred had worked together harmoniously to manage the Trust assets until their attorney, Timothy Clemons, "received an email from James G. Bohm, Esq. completely out of the blue." According to Kenneth, "Mr. Clemons sent Mr. Bohm's email to me on August 2, 2016. Until my receipt of this email, Fred and I had gotten together once a month for lunch to discuss business matters in general. That ceased upon the involvement of, and interference by, Mr. Bohm and Gilbert Partida, Esq. in matters relating to Ruth's care and the business of the LLCs."

In February 2017, Fred, again represented by Bohm and Bohm Wildish, filed a complaint against Kenneth, Kenneth's wife, Lynne, and Kenneth's sister, Andrews, stating causes of action for elder abuse and fraud, among other things. Fred alleged that Kenneth and Lynne had pressured him to sign a power of attorney document, as well as documents creating various limited liability companies, but had not given him copies of any of those documents. Fred further alleged that when his attorney, Bohm, had requested copies of the documents from another attorney who represented Fred, that

attorney refused, revealing he also represented Kenneth and Lynne and that Kenneth had instructed him not to comply.

Approximately 10 days later, Kenneth—represented by attorney Christina McGonigle—petitioned to have a probate conservator appointed for Fred, alleging he "suffers from cognitive impairment and dementia," and "is not able to manage [his] personal needs." Additionally, Kenneth, Lynne and Andrews—this time represented by attorneys from Lewis Brisbois—filed an answer to Fred's complaint, denying the allegations but also asserting, as an affirmative defense, that "[Fred] lacks the capacity or legal competence to sue on behalf of himself or on behalf of the Sacher Family Trust Dated August 2, 1982 as Amended and Restated . . . , because at all relevant times to this action he is or was under the undue influence, threat, fear, intimidation, or fraud by one or more persons, including without limitation . . . James G. Bohm, Esq., and Gilbert Partida, Esq."

In April 2017, Kenneth—again represented by Lewis Brisbois—also filed a complaint on behalf of Ruth against Fred, alleging financial elder abuse, fraud and related causes of action. That complaint repeats the allegations against Bohm and Partida, including that they are "playing on [Fred's] vulnerabilities by saying things . . . that escalate his paranoia and worry, [and] provoking [him] into fighting with his family in order to divide the family and keep themselves on [Fred's] payroll."

In May of 2017, Fred moved, jointly with Bohm and Bohm Wildish, to disqualify Lewis Brisbois and attorney Hegedus from representing Kenneth, Andrews, and Ruth regarding Fred's trust petition action, Fred's elder abuse action and Ruth's elder abuse action (collectively "the civil litigation").[3] Movants contended Lewis Brisbois must be disqualified because it concurrently represented Bohm and the firm of Bohm

[3] Fred, Bohm, and Bohm Wildish also moved to disqualify Lewis Brisbois in the probate action, but that motion was denied and the issue is not before us.

Wildish in an unrelated case, and thus its allegations of unethical conduct against Bohm and Bohm Wildish in the current litigation breached its duty of loyalty to them. They also represented to the court that they would withdraw the disqualification motions if Lewis Brisbois would agree to refrain from direct attacks against Bohm and Bohm Wildish in the litigation, but Lewis Brisbois refused.

Kenneth, Lynne, and Andrews opposed the motions. After several continuances and additional briefing, the court granted the motions in December 2017.

In its rulings, the court stated that "[a]fter weighing the admissible evidence presented in connection with this motion in light of the arguments made, the court is persuaded that Bohm Wildish is a current client of Lewis Brisbois in connection with *Olson v. Grad* (Orange County Superior Court Case No. 2015-00827667) (the '*Olson* Action') for the purpose of this motion." The court rejected the assertion by Lewis Brisbois that the somewhat differently named firm it was representing in the *Olson* Action was not the same entity as Bohm Wildish, noting "[t]he only admissible evidence presented is to the contrary" and then summarized that evidence.

The court also rejected Lewis Brisbois' contention that Bohm Wildish was not a "current" client because it had already been dismissed from the *Olson* Action. As the court explained, "It is undisputed Bohm Wildish (then Bohm, Matsen, Kegel & Aguilera, LLP) was voluntarily dismissed from the *Olson* Action without prejudice on 11/29/16." . . . [¶] However, a voluntary dismissal of a defendant does not per se terminate the attorney-client relationship between that defendant and its attorney. [Citation.] Mr. Bohm offers evidence sufficient to establish he remains in continued contact with Lewis Brisbois attorneys about the status of the *Olson* Action, and that Lewis Brisbois attorneys continued to represent Bohm Wildish's interests in ancillary legal proceedings related to the *Olson* Action."

The court noted that "the Brisbois Attorneys' representation of their clients in this proceeding has involved numerous, direct attacks on the professional integrity of

another Brisbois Attorneys client. The Brisbois Attorneys appear on the caption of at least three different filings in this case in which Kenneth accuses Bohm Wildish and/or Mr. Bohm (one of Bohm Wildish's named partners) of conduct directly implicating their professional integrity and which (if proven) might expose Bohm Wildish and Mr. Bohm to legal liability. [Citations.] Neither are those allegations ancillary to the claims being litigat[ed] in this action. They form the basis for at least some of Kenneth's affirmative claims for relief and some of Kenneth's arguments against Fred's own claims for relief."

The court also found it was "highly significant that . . . Mr. Bohm offered (on Fred's behalf and, presumably, Bohm Wildish's) to withdraw this motion in exchange for the Brisbois Attorneys' stipulation (on behalf of Kenneth and Sharon) not to make or further pursue any allegations in this proceeding regarding professional malfeasance by Mr. Bohm and/or Bohm Wildish. The Brisbois Attorneys declined that offer. [¶] The court reluctantly concludes from the admissible evidence and argument proffered that the Brisbois Attorneys are in the impossible position of vigorously advocating for Kenneth and Sharon's interests in this case by skewering their own client, Bohm Wildish."

DISCUSSION

1. *Disqualification*

"Where an attorney successively represents clients with adverse interests, and where the subjects of the two representations are substantially related, the need to protect the first client's confidential information requires that the attorney be disqualified from the second representation. [Citation.] For the same reason, a presumption that an attorney has access to privileged and confidential matters relevant to a subsequent representation extends the attorney's disqualification vicariously to the attorney's entire firm." (*People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1146 (*SpeeDee Oil*).)

An attorney is also precluded from simultaneously representing two clients with adverse interests because "[a] related but distinct fundamental value of our legal system is the attorney's obligation of loyalty. Attorneys have a duty to maintain undivided loyalty to their clients to avoid undermining public confidence in the legal profession and the judicial process. [Citation.] The effective functioning of the fiduciary relationship between attorney and client depends on the client's trust and confidence in counsel. [Citation.] The courts will protect clients' legitimate expectations of loyalty to preserve this essential basis for trust and security in the attorney-client relationship. [Citation.] Therefore, if an attorney—or more likely a law firm—simultaneously represents clients who have conflicting interests, a more stringent per se rule of disqualification applies. With few exceptions, disqualification follows automatically, regardless of whether the simultaneous representations have anything in common or present any risk that confidences obtained in one matter would be used in the other." (*SpeeDee Oil, supra*, 20 Ca1.4th at pp. 1146-1147.)

2. *Standard of Review*

"Generally, a trial court's decision on a disqualification motion is reviewed for abuse of discretion. [Citations.] If the trial court resolved disputed factual issues, the reviewing court should not substitute its judgment for the trial court's express or implied findings supported by substantial evidence. [Citations.] When substantial evidence supports the trial court's factual findings, the appellate court reviews the conclusions based on those findings for abuse of discretion. [Citation.] However, the trial court's discretion is limited by the applicable legal principles. [Citation.] Thus, where there are no material disputed factual issues, the appellate court reviews the trial court's determination as a question of law." (*SpeeDee Oil, supra*, 20 Ca1.4th at pp. 1143-1144.)

3. *Standing*

In the court's rulings, the court stated it was granting the motions to disqualify counsel "to the extent [they were] brought by Fred," while denying the motions "to the extent [they were] brought by Mr. Bohm and Bohm Wildish." The court noted that because neither Bohm nor Bohm Wildish were "parties" to this litigation, they had not established "their right to appear for the purpose of bringing this motion." However, the court concluded Fred did have standing to bring the motions to disqualify, explaining that "[a]lthough a disqualification motion is typically brought by the client or former client, other parties may have standing to bring such a motion." And because "'[t]he paramount concern must be to preserve public trust in the scrupulous administration of justice and the integrity of the bar'" (citing *SpeeDee Oil*, *supra*, 20 Ca1.4th at p. 1145), "Fred appears to be the only party to [this litigation] in a position to raise the conflict."

Lewis Brisbois contends the court erred in finding that Fred had standing to seek its disqualification. We disagree, but even if the contention were persuasive, it would not undermine the court's rulings in these cases. The motions to disqualify Lewis Brisbois were brought jointly by Fred, Bohm, and Bohm Wildish, and all parties sought the exact same relief. Thus, when the court granted the motions, it did not grant them "to the extent of" any specific moving party—it just granted them.

Hence, as long as any one of those jointly moving parties does have standing to object to Lewis Brisbois' continued involvement in the civil litigation, it is irrelevant that any of the others do not. Consequently, Lewis Brisbois would not be entitled to a reversal of the orders based on a lack of standing unless it demonstrated that none of the moving parties had standing. "'A judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is

not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.'" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.)

The crux of Lewis Brisbois' argument is that Fred lacks standing because he was never its client. The implied concession buried in that contention is that Bohm Wildish—which the trial court found was Lewis Brisbois' client—does have standing. Lewis Brisbois disputed this at oral argument, but it is well-settled that attorneys who are involved in litigation can make limited appearances to advocate on their own behalf when their distinct interests are implicated. (See *Epstein v. Abrams* (1997) 57 Cal.App.4th 1159 [former attorney for defendant appears, in both the trial and appellate courts, to preserve his distinct interest in the enforcement of a fee award]; *Ellis v. Roshei Corp.* (1983) 143 Cal.App.3d. 642, 645, fn. 3 ["Although not a party to the underlying action, Kroah is a party of record in the collateral matter by virtue of the trial court's [sanction] order and has standing to appeal"].)

In any event, we agree with the trial court that Fred's interests were sufficiently implicated in the issue of whether Lewis Brisbois should be disqualified to make him a proper party to bring the matter to the trial court's attention. Fred too has the right to have the counsel of his choice in this litigation, and that implies a right to ensure that his counsel, Bohm and Bohm Wildish, are not distracted or otherwise disadvantaged by the improper conduct of the opposing attorneys who owe Bohm Wildish a duty of loyalty.

Fred also has an interest in the proper conduct of this civil litigation, as well as avoiding the wasted time and expense that would be occasioned by a mistrial. In *Hernandez*, this court concluded that a mistrial was warranted because the defense attorney breached her duty of loyalty to the plaintiff's expert witness—the defense attorney's client in an unrelated matter—by vigorously cross-examining him on the witness stand. Absent Lewis Brisbois' disqualification in these cases, a similar scenario seems likely here.

Finally, we question the very notion that the court's authority to order an attorney's disqualification in a case such as this would depend upon the "standing" of the party which brings the matter to its attention. "A trial court's authority to disqualify an attorney derives from the power inherent in every court '[t]o control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining thereto.'" (*SpeeDee Oil, supra*, 20 Cal.4th at p. 1145.) Significantly, "determining whether a conflict of interest requires disqualification involves more than just the interests of the parties." (*Ibid.*)

Instead, "disqualification motions involve a conflict between the clients' right to counsel of their choice and the need to maintain ethical standards of professional responsibility. [Citation.] The paramount concern must be to preserve public trust in the scrupulous administration of justice and the integrity of the bar. The important right to counsel of one's choice must yield to ethical considerations that affect the fundamental principles of our judicial process." (*SpeeDee Oil, supra*, 20 Cal.4th at p. 1145.) Hence, the relevant "conflict [is] between the defendant's preference to be represented by that attorney and the court's interest in 'ensuring that . . . trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them.'" (*People v. Jones* (2004) 33 Cal.4th 234, 240 (*Jones*).)

Given that the "paramount" interest at stake is the preservation of the public's trust in the integrity of its judicial system, the court's authority to remedy an attorney's ethical breach in the case before it does not depend upon the individual concerns of the party who brings the matter to its attention—in fact, it does not require that any party even request the disqualification. Indeed, in *Jones*, the trial court disqualified defense counsel— a former deputy public defender—over his client's objection, after defense counsel self-reported that both he and his new firm had previously represented another man who might have committed the murder the client was

charged with. No party actually sought the order of disqualification, which the Supreme Court agreed was appropriate.[4]

Here, it is Lewis Brisbois that should have brought the conflict issue to the court's attention, and then explained to the best of its ability why it should not be disqualified from representing its clients in these cases. Its failure to have done so does not require the court to ignore the issue.

Lewis Brisbois cites three cases to support the proposition that a party moving to disqualify his opponent's attorney must demonstrate individual standing—i.e., a legally protected interest impacted by the attorney's representation of the opposing party. However, in each of the cases, *Great Lakes Construction Inc. v. Berman* (2010) 186 Cal.App.4th 1347, *Dino v. Pelayo* (2006) 145 Cal.App.4th 347 (*Dino*), and *DCH Health Services Corp. v. Waite* (2002) 95 Cal.App.4th 829, 832-833, the alleged conflict of interest was only a potential conflict which was waivable by the affected parties. Thus, as the court in *Dino* explained, "[t]rue, joint representation carries the risk that a conflict of interest will arise between the parties. But where, as in this case, the parties consent to joint representation after being fully informed of that risk, the court must not interfere with their choice of counsel absent 'ethical considerations that affect the fundamental principles of our judicial process.'" (*Dino, supra*, 145 Cal.App.4th at pp. 355-356.)

These cases, by contrast, involve circumstances where the conflict of interest between Lewis Brisbois' clients is not merely potential; it is an actual conflict.

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[4] Although *Jones* involved the disqualification of an appointed defense attorney, the Supreme Court has made clear that the distinction between appointed and retained counsel is inconsequential: "[O]nce counsel is appointed to represent an indigent defendant, whether it be the public defender or a volunteer private attorney, the parties enter into an attorney-client relationship which is no less inviolable than if counsel had been retained." (*Smith v. Superior Court* (1968) 68 Cal.2d 547, 562.)

Lewis Brisbois is directly attacking its own client, Bohm Wildish, accusing it of engaging in unethical conduct that is a central part of the allegations of the clients it represents in these cases. Thus, the "more stringent per se rule of disqualification applies [and w]ith few exceptions, disqualification *follows automatically*, regardless of whether the simultaneous representations have anything in common or present any risk that confidences obtained in one matter would be used in the other." (*SpeeDee Oil, supra*, 20 Ca1.4th at p. 1147, italics added.) In these circumstances, the trial court's obligation to act arises out of its inherent obligation to "preserve public trust in the scrupulous administration of justice and the integrity of the bar" (*Id.* at p. 1145).

For all of these reasons, we find no error in the trial court's determination that it had authority to disqualify Lewis Brisbois from the civil litigation.

4. Disqualification based on Representation of Bohm Wildish

Lewis Brisbois next contends "the trial court's disqualification order was based on the erroneous premise that [it] owed a duty of loyalty to Mr. Bohm, *individually* based on its representation of Mr. Bohm and Bohm Matsen" in the unrelated Olson Action. We find no such premise reflected in the court's rulings.

The court consistently states that it is Bohm Wildish, the firm, which is Lewis Brisbois' client in the *Olson* Action, and it points out there are "at least three different filings in this case in which [Lewis Brisbois] accuses Bohm Wildish and/or Mr. Bohm (one of Bohm Wildish's named partners) of conduct directly implicating their professional integrity and which (if proven) might expose Bohm Wildish and Mr. Bohm to legal liability." It is based on those facts that the court "reluctantly concludes . . . that [Lewis Brisbois] are in the impossible position of vigorously advocating for Kenneth[, Andrews, and Ruth's] interests in this case by skewering their own client, Bohm Wildish."

The court's rulings make clear that it is Bohm Wildish, rather than Bohm individually, to which Lewis Brisbois owes a duty of loyalty. Since Bohm Wildish is an entity which acts through its attorneys—including Bohm and Partida—the allegations of wrongdoing by both of those attorneys are, by definition, allegations against the firm itself. Thus, by accusing Bohm and Partida of wrongdoing in these cases, Lewis Brisbois is breaching the duty of loyalty it owes to Bohm Wildish. We find no error in that analysis.

5. Applicability of Hernandez

Lewis Brisbois also claims the court erred by relying on *Hernandez* to support its disqualification. A different panel of this court concluded the trial court erred in *Hernandez* by not granting the plaintiff's motion for a mistrial after the defense attorney breached her duty of loyalty to the plaintiff's expert witness—the defense attorney's client in an unrelated matter—by vigorously cross-examining him on the witness stand about his history of professional discipline and malpractice allegations, in an effort to undermine the credibility of his opinions. As the court explained, "[t]he spectacle of an attorney skewering her own client on the witness stand in the interest of defending another client demeans the integrity of the legal profession and undermines confidence in the attorney-client relationship." (*Hernandez, supra*, 109 Cal.App.4th 452, 467, citing *Flatt v. Superior Court* (1994) 9 Cal.4th 275, 285 (*Flatt*).)

Lewis Brisbois contends *Hernandez* is inapplicable because it involved a lay client, and relying on *Flatt*, it pointed out that """[a] lay client is likely to doubt the loyalty of a lawyer who undertakes to oppose him in an unrelated matter."""" (*Hernandez, supra*, 109 Cal.App.4th at p. 466.) According to Lewis Brisbois, because Bohm and Bohm Wildish are not lay clients, and are "well-versed in the adversarial nature of litigation," that concern—and thus the rule itself—would not apply to them. We cannot

agree because *Flatt* itself involved an attorney's duty of loyalty to an existing client who was also an attorney.

In *Flatt*, the attorney consulted with a client, Daniel, who was contemplating a legal malpractice claim against another attorney. Shortly after the consultation, the attorney declined the representation after recognizing that the subject of the proposed malpractice complaint, Hinkle, was another client of her firm. Daniel thereafter waited over a year to file the legal malpractice complaint against Hinkle, and then also alleged that the attorney he had consulted with was negligent in not advising him about the statute of limitations applicable to his contemplated malpractice claim. The Supreme Court rejected the contention as a matter of law, concluding that the attorney's duty of loyalty to Hinkle, her firm's existing client "required her . . . to sever any professional relation with Daniel promptly upon learning of the conflict and, as a legal complement to that obligation, absolved her of a duty to provide *any* advice to Daniel adverse to the interests of Hinkle." (*Flatt, supra*, 9 Cal.4th at p. 281.)

In reaching that conclusion, the Supreme Court cited former rule 3-310(C)(2) of the State Bar Rules of Professional Conduct, noting that "[t]he practical administration of the rule has not been confined to what is perhaps the most egregious example of its violation—simultaneously representing opposing parties in the same litigation." (*Flatt, supra*, 9 Cal.4th at pp. 282-283.)[5] Rather, because "[t]he primary value at stake in cases of simultaneous or dual representation is the attorney's duty—and the client's legitimate expectation—of *loyalty*, rather than confidentiality," the test for disqualification is "more stringent." (*Id.* at p. 284.) Thus, "[e]ven though the simultaneous representations may have *nothing* in common, and there is *no* risk that

[5] Former rule 3-310 of the State Bar Rules of Professional Conduct has been superseded by Rule 1.7 of the State Bar Rules of Professional Conduct, effective November 1, 2018. The comment to the new rule cites *Flatt, supra*, 9 Cal.4th 275, as authority for the rule.

confidences to which counsel is a party in the one case have any relation to the other matter, disqualification may nevertheless be *required*." (*Ibid*.)

Flatt also fatally undermines Lewis Brisbois' contention that *Hernandez* does not require its disqualification in these cases because it has thus far only made "allegations of undue influence" against Bohm, and has not actually attacked any Bohm Wildish attorney under oath, as occurred in *Hernandez*. In *Flatt*, the Supreme Court held that the attorney was required to "sever any professional relation" with the new client "promptly upon learning of the conflict." (*Flatt, supra*, 9 Cal.4th at p. 281.)

Flatt is essentially on all-fours with this issue here, as it involves a law firm that already represented another attorney as a client, when it was presented with an opportunity to represent a new client who intended to allege unrelated acts of misconduct against that same attorney/client in a different case. The only significant distinction we see is that in *Flatt*, the law firm immediately concluded that it would be unethical to represent the new client against its existing client—a conclusion resoundingly endorsed by the Supreme Court—while in these cases, Lewis Brisbois did not. We are bound by *Flatt*. So is Lewis Brisbois.

6. Failure to Balance Appropriate Factors

Lewis Brisbois' final contention is the orders must be reversed because the trial court failed to balance all the appropriate factors before ruling. It relies on *Smith, Smith & Kring v. Superior Court* (1997) 60 Cal.App.4th 573, 582 (*Smith*), another case out of this court, for the proposition that "trial judges must indicate on the record they have considered the appropriate factors and make specific findings of fact when weighing the conflicting interests involved in recusal motions." The *Smith* contention is not persuasive here.

Initially, we note the trial court generated a detailed explanation of its decision to disqualify Lewis Brisbois, including factual findings and a summary of the

evidence supporting them, as well as an explanation of the cases and legal principles it relied upon in concluding that disqualification was proper. It would be difficult to conclude that more was required to demonstrate the court gave appropriate and sufficient consideration to the issue.

But this case is also distinguishable from *Smith* because it involves a per se—or automatic—disqualification, rather than a discretionary disqualification that relies upon the court's balancing of interests. In *Smith*, the attorneys were disqualified from representing the defendant attorneys in a legal malpractice case because they had previously represented the defendants in the underlying litigation at issue in the case. The plaintiff (in both cases) had sought the attorneys' disqualification in the malpractice case on the basis they would likely be called to testify as witnesses.

Although the attorneys in *Smith* had obtained the written consent of their client to continue the representation in the malpractice case, the trial court nonetheless disqualified them, concluding the possibility that the attorneys would be called to testify was "'just not tolerable'" and "failed 'the smell test.'" (*Smith*, *supra*, 60 Cal.App.4th at p. 580.) In reversing, this court concluded "'the smell test' is not consonant with the current state of the law. Although a court has discretion to recuse an attorney who may testify, in exercising that discretion, the court must weigh the competing interests of the parties against potential adverse effects on the integrity of the proceeding before it and 'should resolve the close case in favor of the client's right to representation by an attorney of his or her choice . . . .'" (*Ibid.*) There was no indication the trial court in *Smith* had engaged in that weighing process, since there was no evidence in the record demonstrating the attorneys' testimony would actually be required on any specific issue—and thus no basis for concluding "how any testimony would be adverse to the integrity of the judicial process." (*Id.* at p. 581.)

Because the disqualification of Lewis Brisbois in these cases was mandatory based on the facts as found by the trial court, there were no factors to balance in deciding whether disqualification was appropriate. Thus, we find no error in the court's failure to indicate it engaged in such a balancing test.

DISPOSITION

The orders are affirmed. Fred is to recover his costs on appeal.

GOETHALS, J.

WE CONCUR:

FYBEL, ACTING P. J.

THOMPSON, J.